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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 608

A. H. PHILLIPS, INC., PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE
WAGE AND HOUR DIVISION, UNITED STATES DE-
PARTMENT OF LABOR

ON ~~PETITION FOR~~ WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIRST
CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 11-20) is reported in 50 F. Supp. 749. The opinion of the Circuit Court of Appeals (R. 23-30) is reported in 144 F. (2d) 102.

JURISDICTION

The petition for certiorari was filed on October 18, 1944, and granted on December 4, 1944. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether employees employed in the central office and warehouse of a chain store system, through which goods move from outside of the State to 49 separate retail stores located in two States, are "engaged in a retail * * * establishment" and therefore exempt from the wage and hour provisions of the Fair Labor Standards Act.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C., sec. 201 *et seq.* Section 13 (a), the interpretation of which is involved in this case, provides:

SEC. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *.

STATEMENT

This case arises upon a complaint (R. 1-6) filed by respondent in the District Court under Section 17 of the Fair Labor Standards Act, praying for an injunction directing petitioner to cease violations of the overtime and record keeping provisions of the Act (Secs. 7, 11). The facts were

stipulated and found by the District Court as stipulated (R. 11-17). They may be summarized as follows:

Petitioner is a chain store corporation dealing in canned fruits and vegetables, soap, flour and other staples, cigarettes, fresh fruits and vegetables, bread, milk, and other groceries (R. 11-12). It operates 49 retail stores, all of which are so located as to serve distinct trading areas (R. 11, 13). The stores are located in approximately 16 cities and towns scattered over a radius of 35 miles from Springfield, Massachusetts—40 in western Massachusetts and nine in Connecticut (R. 11, 13).

Quite apart from the retail stores, petitioner maintains a separate warehouse and office building, located in Springfield (R. 11, 13). No selling is done there; the warehouse is maintained as a point of concentration and distribution through which petitioner funnels merchandise on its way from scattered suppliers to the retail stores (R. 13-14). The warehouse maintains a large inventory, reflected in a card index showing the amount of each commodity on hand (R. 12). When the index shows that the inventory of a particular item is low, additional merchandise is ordered for subsequent shipment to one of the retail outlets for sale (R. 12). "There is a considerable amount of regularity in the demand from the retail stores for the particular commod-

MICRO CARD

TRADE MARK 

22

44

1891



63



ities, and the requirements to meet this demand from week to week can be anticipated" (R. 12).

About 80 percent of the merchandise passing through the warehouse is received from outside Massachusetts (R. 13). The warehouse is served by a direct railroad siding with a freight-receiving platform which accommodates eight freight cars (R. 12). Two-thirds of the merchandise arrives by rail, chiefly in carload lots, and is unloaded from the cars onto petitioner's unloading platform by its warehouse employees; the remainder comes in by truck (R. 13). From the warehouse a regular order is delivered once each week to each store and additional deliveries are made as required (R. 14). Merchandise is supplied on the basis of requisitions prepared by the individual store managers, subject to revision by one of three superintendents in the central office, each of whom has general supervision of a group of stores (R. 14, 16). A number of items of the stock ~~is~~ carried in the warehouse "turn-over" once a week; the average turnover is about twelve times annually (R. 15). Ninety percent of the merchandise is shipped from the warehouse to the stores in the original unbroken packages (R. 15). All petitioner's sales are made at the retail stores and deliveries to customers are made exclusively from the goods at the stores and not from the warehouse.

The employees involved in this action are engaged in the warehouse and central office; the

action is not concerned with employees in the retail stores. The office employees, among other duties, check invoices, pay bills and check direct deliveries to the stores. There is no segregation of their time between their services in connection with the ordering and receipt, or shipment, of out-of-state goods and their other duties (R. 15-16). The receiving, shipping, and billing clerks handle interstate and intrastate shipments indiscriminately (R. 16). The warehousemen and their helpers as a regular part of their duties unload incoming shipments from outside Massachusetts and make up outgoing shipments to Connecticut (R. 16).¹

On these facts the District Court held that the warehouse and central office employees were engaged in interstate commerce and were covered by the Act (R. 18-19); and that they were not exempted from the wage and hour provisions by Section 13 (a) (2) since the central warehouse and office was not "a retail or service establishment" (R. 19-20). The Circuit Court of Appeals affirmed (R. 23, 30), holding: (1) that the employees in petitioner's central office and warehouse were engaged in interstate commerce within the meaning of the Act (R. 25); and (2) that the central office and warehouse is a distinct unit which "performs a quasi-wholesale and certainly

¹ Eighteen percent of the total sales by dollar volume is sold through the Connecticut stores from merchandise shipped through the Springfield warehouse (R. 12).

a non-retail function" and therefore is not a retail establishment within the exemption provided by Section 13 (a) (2) (R. 27). Only the latter point is argued by the petitioner here.

SUMMARY OF ARGUMENT

A

Under the normal meaning of the language of the Act the term "establishment" connotes "a place of business, or a building or location where business is conducted." While there are looser senses in which the term may sometimes be used, its primary commercial and mercantile connotation is one of *locus*, not of enterprise or organization. *Webster's New International Dictionary* (2d ed., 1934); 16 Cyc. 593; 30 C. J. S., p. 1234; *Black's Law Dictionary* (3d ed.). The context of the term in Section 13 (a) (2) and its use in another section (Section 12 (a)) of the Act support this conclusion. Petitioner's interpretation would assume, contrary to the statute, that the term "means one thing in one section and something else in another." See *Western Union Telegraph Co. v. Lenroot*, No. 49, this Term, decided January 8, 1945, slip opinion, p. 10.

B

Under settled business and governmental usage each unit of a chain store system is regarded as a separate establishment, and a chain store warehouse is regarded as falling outside the cate-

gory of "retail establishment." Prior to the enactment of the Fair Labor Standards Act, the term "*establishment*" was used in diverse regulatory and taxing statutes, in administrative regulation and business analyses to describe a place of business in contradistinction to an enterprise or organization made up of a number of integrated units. Under the N. R. A. Codes of Fair Competition, in the formulation of which the trade associations actively participated, and under the Bureau of Census Studies and Analyses, each physically segregated unit of a chain store organization is regarded as a distinct establishment.

Likewise in normal governmental and business practice, the warehouse and central office unit of a chain is not characterized as "retail." The functions performed in the warehouse and central office are essentially the same as wholesaling. Wholesalers are admittedly not within the exemption. To adopt petitioner's or the American Retail Federation's broad construction of the exemption would impute to Congress an intent to favor the chain's wholesaling units over the independent wholesaler, although their functions are scarcely distinguishable. Such a construction would run counter to the declared purpose of the Act to remove unfair competitive advantage gained by payment of substandard wages (Section 2 (a), cf. Section 8), and also would result in removing from the scope of the Act a

multitude of wholesaling and even manufacturing activities now being taken over by chain systems—activities which Congress certainly did not intend to exempt. It is not to be presumed, in the absence of evidence of such a purpose, that Congress intended thus to favor the chain over the independent wholesaler, or to effect so serious a curtailment of the application of the Act. There is no evidence of such a purpose in the legislative history.

C

The legislative history of Section 13 (a) (2) shows that Congress used the words “retail establishment” in their accepted sense and intended the exemption to be one for the protection of the grocery store, the clothing store, the shoe store, and similar local merchants situated near State lines, and not for the advantage of the great chain store warehouses competing with non-exempt wholesalers in the interstate distribution of goods. The deliberate legislative substitution of the word “establishment” for the word “industry” is unmistakable evidence of the legislative intent to restrict the exemption.

D

If the meaning and purpose of the exemption were otherwise uncertain, the consistent administrative interpretation should be decisive. Plainly, the Administrator's interpretation is a permissible

and reasonable construction of the statutory language. His interpretation has been consistently maintained, and represents the result of thorough consideration of the pertinent factors.

ARGUMENT

PETITIONER'S WAREHOUSE AND CENTRAL OFFICE EMPLOYEES ARE NOT ENGAGED "IN A RETAIL ESTABLISHMENT"

The petitioner does not deny that its warehouse and central office employees are engaged in interstate commerce within the meaning of the Act. All the employees participate either in the receipt of goods from outside Massachusetts, and are therefore engaged in "buying and receiving across State lines" (*Fleming v. Jacksonville Paper Co.*, 128 F. (2d) 395, 398 (C. C. A. 5), affirmed, 317 U. S. 564), or in making interstate shipments to Connecticut (R. 16).

The question here, then, is solely whether petitioner's warehouse and central office employees are employed "in a retail establishment" within the meaning of the exemption provision in Section 13 (a) (2). At the outset, therefore, it does not seem amiss to emphasize that an exemption from remedial legislation is to be narrowly construed and extended only to those "plainly within its terms." *McDonald v. Thompson*, 305 U. S. 263, 266; *Piedmont & Northern Ry. v. Interstate Commerce Comm.*, 286 U. S. 299, 311-312;

Spokane & Inland R. R. v. United States, 241 U. S. 344, 350.²

A. THE NORMAL MEANING OF THE TERM "ESTABLISHMENT" IS A PLACE OF BUSINESS AND NOT A MULTI-UNIT CORPORATION OR BUSINESS ENTERPRISE

Section 13 (a) (2) provides:

The provisions of sections 6 and 7 shall not apply with respect to * * * any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *.

Petitioner's basic contention is that its entire enterprise or organization taken as a whole constitutes a single "retail establishment" (br., p. 3). It argues that the words "retail establishment" are unambiguous and takes issue with the Administrator's interpretation that "establishment" as used in Section 13 (a) (2) refers to each distinct place of business rather than to an enterprise or an organization. We submit that in ordinary, natural usage, the word "establishment" signifies a place and its primary commercial meaning is a "place of business." See *Webster's New Inter-*

² For cases applying this principle to exemptions from the Fair Labor Standards Act see *Bowie v. Gonzalez*, 117 F. (2d) 11, 16 (C. C. A. 1); *Schmidtke v. Conesa*, 141 F. (2d) 633 (C. C. A. 1); *Calaf v. Gonzalez*, 127 F. (2d) 934, 937 (C. C. A. 1); *Conley v. Valley Motor Transit Co.*, 139 F. (2d) 692 (C. C. A. 6); *Fleming v. Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56 (C. C. A. 8); *Consolidated Timber Co. v. Womack*, 132 F. (2d) 101, 106 (C. C. A. 9); *Joseph v. Ray*, 139 F. (2d) 409, 410 (C. C. A. 10).

national Dictionary (2d ed., 1934); 16 Cyc. 593; 30 C. J. S., p. 1234; *Black's Law Dictionary* (3d ed.). There are looser senses in which the term is used, but the ordinary mercantile connotation seems clearly to be one of *locus* and not of organization or enterprise.

That the term is used in Section 13 (a) (2) in the sense of a distinct place of business seems evident from its context in that section, as well as from its use in another section of the Act. Section 13 (a) (2) speaks of employees "engaged in a retail or service *establishment*" and not of employees of a retail *enterprise* or employed by a retail *organization*. Although the use of the word "in" might not be of any significance standing alone, it is significant when read in connection with Section 12 (a) of the Act, which unmistakably uses the word "establishment" in the sense of a place of business. Section 12 (a) prohibits the shipment in interstate commerce of "goods produced *in an establishment situated* in the United States *in or about which* within thirty days prior to the removal of such goods *therefrom* any oppressive child labor has been employed". The italicized words pertain to place and not to organization; "in or about which" can refer only to each place where business is carried on; an enterprise does business in the United States and a corporation is domiciled there, but neither is "situated"; and surely goods are not produced "*in*" an enterprise or corporation and are not removed "*therefrom.*" In Sec-

tion 12 (a), therefore, "establishment" must mean "place of business" and it is not to be assumed that it "means one thing in one section and something else in another." See *Western Union Telegraph Co. v. Lenroot*, No. 49, this Term, decided January 8, 1945, slip opinion, p. 10; *United States v. Cooper Corp.*, 312 U. S. 600, 607.

B. UNDER COMMON BUSINESS AND GOVERNMENTAL USAGE EACH UNIT OF A CHAIN STORE SYSTEM IS A SEPARATE "ESTABLISHMENT" AND A CHAIN STORE WAREHOUSE IS NOT A "RETAIL ESTABLISHMENT"

It is not necessary, however, to rely solely on the normal meaning of "establishment" or on its usage elsewhere in the Act. The terms "establishment" and "retail" are not novel in legal, governmental, and business usage. According to such usage, each distinct physical unit of petitioner's organization is a separate establishment; petitioner's retail grocery stores where the public may trade are typical "retail establishments"; the building in which the central office and warehouse are located, taken by itself, also constitutes an "establishment", but it is not a "retail establishment" within the meaning of the Act, because it engages in wholesaling functions for the stores and does not sell at retail to the consuming public.

1. *Governmental and business usage of term "establishment"*

Prior to the Fair Labor Standards Act "establishment" was commonly found in diverse regu-

latory and taxing statutes, in administrative regulations and business analyses. It was used to describe a place of business in contradistinction to an enterprise or organization made up of a number of integrated units. Applied to a chain store system, "establishment" described each unit of the chain. It cannot be assumed that Congress was ignorant of this established practice—much of it under N. R. A.—and when Congress used the term, it must have done so with the intention that it be given this accepted governmental and commercial meaning.

In such varied fields of business legislation as taxation,³ fire prevention, child labor, employer's

³ See Ala. Code (1940), title 51, sec. 620-629; Colo. Stat. Ann. (1935), vol. 4, c. 161, secs. 1-11; Del. Rev. Code, (1935), c. 6, sec. 145, p. 59; Fla. Stat. Ann. (1941) secs. 204.01-204.16; Ga. Laws (1937), no. 355, secs. 1-13, p. 75; Idaho Sess. Laws (1933), c. 113, secs. 1-15; Ind. Stat. Ann. (Burns, 1933), secs. 42-301-42-313; Iowa Code (1939), c. 329.5, secs. 6943.126-6943.141; Ky. Rev. Stat. (1944), secs. 137.200-137.250; La. Gen. Stat. Ann. (1939), vol. 6, secs. 8664-8674; Md. Code Ann. (1939), vol. 2, art. 56, sec. 65; Mich. Comp. Laws (Mason Cum. Supp. 1940), vol. 5, c. 186A, secs. 9757-1-9757-13; Minn. Stat. (1941), vol. 1, secs. 328.01-328.16; Miss. Gen. Laws (1936), c. 157, secs. 1-9; 1939 Supp. to Mont. Rev. Code 1935, c. 221, secs. 2428-2428.14; N. C. Pub. Laws (1939), c. 158, sec. 162; S. C. Code (1942), vol. 2, sec. 2556; S. D. Code (1939), vol. 3, c. 57.34, secs. 57.3401-57.3407; Tex. Stat. (Vernon, 1936), Penal Code vol. 2, art. 1111d, secs. 1-11; W. Va. Acts (reg. sess., 1923), c. 36, secs. 1-12; Wis. Spec. Sess. Laws (1937), c. 12, expired July 1, 1939. Compare *Great Atlantic & Pacific Tea Co. v. Morrisett*, 58 F. (2d) 991 (E. D. Va.), affirmed, 284 U. S. 584.

liability, and hours of employment,⁴ legislatures and courts alike, with rare exceptions,⁵ speak of an "establishment" to denote a "place of business," and have treated each physical unit of an organization as a distinct "establishment." Chain store tax statutes, perhaps, are the most familiar precedents in this field. Without exception they treat every chain store organization as comprised of many "establishments." They have not re-

⁴ See 16 ALR 537 and 96 ALR 1351 for compilations of cases under these statutes, including many turning on the meaning of "establishment." Under these statutes courts have indicated clearly that the "establishment" contemplated is a physical place where business is carried on. See *Atlantic Ice & Coal Co. v. Maxwell*, 210 N. C. 723, 188 S. E. 381, 383; *Truman v. Kansas City, M. & O. R. Co.*, 98 Kans. 761, 161 Pac. 587, 588-539; *Lilley v. Eberhardt*, 37 S. W. (2d) 599, 600-601 (Sup. Ct. Mo.); *Baltimore & O. S. W. R. R. Co. v. Cavanaugh*, 35 Ind. App. 32, 71 N. E. 239; *McNabb v. Clear Springs Water Co.*, 239 Pa. 502, 87 Atl. 55; *Williams Bros. Mfg. Co. v. Naubuc Fire District*, 92 Conn. 672, 104 Atl. 245; *Barfoot v. White Star Line*, 170 Mich. 349, 136 N. W. 437, 441; *Detroit Edison Co. v. Secretary of State*, 281 Mich. 428, 275 N. W. 196.

⁵ Petitioner cites two instances, *Chrysler Corp. v. Smith*, 297 Mich. 438, 298 N. W. 87, and *Spielmann v. Industrial Comm.*, 236 Wisc. 240, 295 N. W. 1 (br., p. 8). We have found no other exceptions to the accepted usage stated above. Both of the above cases were decided in 1940, that is, subsequent to the enactment of the Fair Labor Standards Act. Also, even if it be assumed that the broad interpretation of the term "establishment" was warranted in those cases (but see the strong dissenting opinion in the *Chrysler* case, 297 Mich., at 454-476), the policy of the unemployment compensation statutes involved in those cases, and the context of the word "establishment" in those statutes are quite different from the statutory policy and context of the term here.

garded as one "establishment" the business of an entire retail chain. Indeed, many statutes used the number of "establishments" as the measure of the tax.⁶

Similarly, under N. R. A. Codes of Fair Competition, prepared by committees from the industries concerned, the word "establishment" was used in the sense of a "place of business," and warehouses and other nonretail selling units of retail chains were treated as distinct from the retail outlets. Both the Code for the Retail Food and Grocery Trade and the Code for the Wholesale Food and Grocery Trade used the term "establishment" in the sense of the physical place where the business was carried on, and not in the sense of a whole enterprise. The Retail Food and Grocery Trade Code defines the term as "any store, department of a store, shop, stand, *or other place where*" the retailer carries on business. [*Italics supplied.*]⁷ The Wholesale Food and Grocery Trade Code defines the term "establishment" as "any warehouse, office, *or any other establishment where*" a wholesaler carries on busi-

⁶ See n. 3, p. 13, *supra*.

⁷ The full definition reads as follows: "The term 'retail food and grocery establishment' or 'establishment' as used herein shall mean any store, department of a store, shop, stand, or other place where a food or grocery retailer carries on business other than those places where the principal business is the selling at retail of products not included within the definition of retail food and grocery trade." See *N. R. A. Codes of Fair Competition*, Vol. IV, p. 460-461.

ness. [*Italics supplied.*]* While the retail stores of a chain system were subject to the Retail Food and Grocery Code, the chain store warehouses and central offices were treated as separate establishments subject to the Wholesale Code, and were not regarded as parts of a "retail establishment."*

* The definition in *Full* reads as follows: "The term 'wholesale food and grocery establishment' or 'establishment' as used herein shall mean any warehouse, office, or department of any other establishment where a food and grocery wholesaler carries on business, other than those places where the principal business is the selling of merchandise at retail or the selling at wholesale of products not included within the definition of wholesale food and grocery trade." (*Id.*), Vol. V, pp. 5-6.

* The retail and wholesale food and grocery codes were under a common Code Authority, the National Food and Grocery Distributors' Code Authority (Vol. IV, p. 470, Vol. V, pp. 13-14), which held that chain store warehouses were governed by the wholesale, rather than the retail code. See N. R. A. files on the Code of Fair Competition for the Wholesale Food and Grocery Industry [Code No. 196—Classification], Memorandum from Irwin S. Moise, Acting Deputy Administrator to Ruth E. Rubin, Acting Trade Practice Compliance Officer, dated September 5, 1934, "Please be advised that employees working in warehouses for chain grocery stores, whose business is the wholesaling and distributing of merchandise to retail outlets, are governed by the Wholesale Food and Grocery Code." Also see memoranda from F. B. Northrup, Assistant Deputy Administrator to Eugene C. Mahoney, State N. R. A. Compliance Director, dated December 8, 1934 to Harold B. Saler, dated January 8, 1935, and to F. E. Morris, State Compliance Officer, dated January 5, 1935. This last memorandum states that "Whereas, such a warehouse does not make sales to retailers in the ordinary sense of a wholesaler, yet the wholesale function is being performed and under the definition of a food and grocery wholesaler, it would appear clear that all its operations should be governed

The Bureau of the Census also has adopted the "establishment" as its basic unit for compiling official census reports on manufacturing, wholesaling, and retailing. The term is defined as "the place where the business is conducted."¹⁰ A multi-unit company is required to submit a separate report for each of its "establishments," and, for this purpose, different forms are furnished.¹¹ Each store, warehouse, manufacturing or processing plant, or other physically segregated unit of a chain store organization is treated as a separate "establishment."¹²

by the Wholesale Code." And see N. R. A. History of the Code of Fair Competition for the Wholesale Food and Grocery Trade (Code History 196) Oct. 27, 1936, pp. 83-84.

¹⁰ See *Instructions to Enumerators for Business and Manufactures* (1939), Sixteenth Decennial Census of the United States, p. 22.

¹¹ *Id.*, pp. 90-116. There are numerous examples of the distinction which the Census draws between "establishment" and "organization" or "company." See, e. g., Census Forms (1939), Census of Business: 1939, *Retail Trade*, Vol. I, p. 876, Form 21 (Retail Schedule); Census of Business: *Wholesale Trade*, 1939, Vol II, pp. 1050-1057, Form 31 (Wholesale Schedule), Form 32 (Petroleum Bulk Tank Stations), Form 33 (Agents and Brokers), Form 34 (Farm Products).

Item 1, Census Form 10 (1939), used by multi-unit organizations to report data concerning central administrative offices, chain store warehouses, physically segregated central garages, etc., requested information regarding (1) "Name of Establishment," (2) "Location of Establishment," (3) "Type of Establishment (such as central office, district office, chain store warehouse, etc.)," and (4) "Name of Organization or Company of which this Establishment is a Part."

¹² The Retail Federation's brief states that the fact that the Census treats each physically segregated part of a chain enterprise as a separate establishment is not significant since the

Under legislative, governmental, and business usage, therefore, petitioner's enterprise is not a single "establishment." Each of the stores and the warehouse and central office are distinct establish-

Bureau of Census "treats the warehouse of each type of retailer, as a 'retail establishment'" (br., p. 23). This is not an accurate statement. While it is true that in the 1935 and 1939 Census of Business, the chain store warehouses and central office buildings were included under the general classification "Retail Distribution," and "Retail Trade" respectively, and were analyzed under the general heading "Retail Chains," this clearly appears to have been done only because of the relationship of the retail chains to their warehouses and central offices and not because the latter, taken alone, were regarded as retail in character. Census of Business: 1935, *Retail Distribution*, Vol. I, p. 26-27, 1939 Census of Business, *Retail Trade*, Vol. I, p. 31-33. See also pages 183-184. This is evident from the census prior to 1935, when the chain store warehouses and central offices were included under the classification "Wholesale Distribution" (Census of Business 1933, pp. 5, 30), which was described as covering "the whole range of organizations engaged in wholesale trade and which perform wholesale functions, including * * * chain store warehouses * * *" (p. 5).

The reasons for this classification were carefully stated and are peculiarly significant to the issue here. Chain store warehouses were defined as "establishments maintained by retail chains as distributing stations used to supply their stores with merchandise. In some respects they are similar in operations to establishments of wholesale merchants, and are, in reality, more than mere warehouses. They maintain stocks, break bulk, and deliver and bill the merchandise to retail outlets" (*Id.*, p. 30).

No explanation is given for the transfer in the 1935 and 1939 census of the data on chain store warehouses to the Retail Trade classification. However, it is evident that the transfer was not occasioned by any change of opinion regarding the wholesale character of the functions of such warehouses. They are still analyzed as a type of establishment

ments and the character of each is to be separately determined from its particular functions.

2. *Governmental and business usage of term "retail"*

Likewise, in normal governmental and business practice, petitioner's warehouse and central office building is not a *retail* establishment. Petitioner argues (br., p. 12) that the employee in the stock room or basement storeroom of a retail store is exempt, and that therefore the Administrator is guilty of "administrative legislation" in construing the exemption granted by Section 13 (a) (2) as inapplicable to its large separate warehouse which handles all the purchasing and distributing of merchandise to 49 retail stores. But the distinction is clear. And it is not merely that the stock room in a retail store is within the literal language of the exemption—that it is physically *in* the establishment where the retail sales are made. The functions performed in the stock room and in the separate warehouse differ in kind. The distinction has been explained convincingly from a practical business point of view: *"Some agency must provide the machinery to move all merchandise from the producer to the retailer. Regardless of what this function is called, it is essentially the same as wholesaling."*

separate and distinct from the retail stores, and they report the distribution to their own stores as "Reported Sales (*at wholesale*)."

[Emphasis supplied.] See 1939 Census, Tables 21 (A) and 21 (B), pp. 183-184.

* * * Chain stores, once they assume enough importance to justify a warehouse, are engaged in wholesaling as well as retailing. Whatever goods are handled at retail outlets must be bought in quantity, handled in the warehouse and allotted to the individual stores in much the same way that wholesalers would serve the independent dealers." [Italics are the author's.] *Chamber of Commerce of the United States, National Wholesale Conference, Report of Committee 1, Wholesalers' Functions and Services, 1929* pp. 13-14.¹³

The business fact thus stated is illustrated by the operations of petitioner's warehouse. The warehouse receives goods in carload lots delivered at its freight platform from a direct railroad siding (R. 12-13); the warehouse employees divide the merchandise and distribute it to the stores in large quantities—a week's supply for each store (R. 14)—where it is sold to the consumer in small lots and at retail. The warehouse is the intermediate distribu-

¹³ See also, *Does Distribution Cost Too Much?* 20th Century Fund (1939), pp. 100-110 (particularly table 14, p. 106), 171-209, 345-346 (chain store warehouses classified as intermediary trade, together with independent wholesalers and manufacturers of sales branches; retailing is the last step in the chain of distribution and is limited to the transfer of commodities from the retail store to the household consumer); Nystrom, *Chain Stores*, Domestic Distribution Department, Chamber of Commerce of the United States, 1930, p. 16; Beckman and Nolen, *The Chain Store Problem*, 1938, pp. 7-9, 48-49; see U. S. Bureau of the Census, *Census of American Business*, 1933, *Wholesale Distribution*, vol. 1, p. 30.

tive link, like the wholesaler it replaced, in the journey from grower or manufacturer to ultimate consumer. The employees in the "billing department" make out invoices to each store for the shipments it receives (R, 16). Except for the fact that it does not make technical "sales," petitioner's warehouse is a wholesale establishment." Cf. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564.

Petitioner's argument that a chain store warehouse is so closely akin to the stock room of a single store as to require similar treatment has been rejected by courts as well as by experts on distribution. In a decision upholding a statute taxing chain store "distributing houses" at the same rate as wholesale houses (*Great Atlantic & Pacific Tea Co. v. Morrisett*, 58 F. (2d) 991, 993 (E. D. Va.), affirmed without opinion, 284 U. S. 584), a three judge statutory court said:

"This is obviously not simply a case where a single retail store has found it "convenient or necessary to rent storage space in a building across the street" (cf. petitioner's br., p. 12). To regard each physically separated place of business as a separate establishment does not necessarily mean that the place of business may not include more than one building if the buildings are situated in the same location and are in fact operated as a single physical unit or place of business. Where, as here, however, there is a clear physical and geographical separation of the buildings, no difficult problem of drawing lines or distinctions is presented. The warehouse and central office building here are so situated as to remove any doubt that it is a place of business separate from the retail stores.

It is contended that there is no real difference between complainant's distributing house and a place maintained by a large department store from which goods are supplied to the various departments of one store, and that to tax in the one case and not the other is discriminatory. We cannot agree with this contention. The one is a place corresponding to a wholesale house, the other simply a storage house, and to classify them differently for purposes of taxation is well within the functions of the taxing power of the state.

The report of the National Wholesale Conference quoted above (pp. 19-20) and this opinion reflect a general understanding. A special committee of the Bureau of the Budget, set up to standardize industrial data of all federal and state agencies and other research groups, has established a standard industrial classification which is designed to conform to the existing structure of American industry. This analysis excludes chain store warehouses from the category of retail establishments. See Executive Office of the President, Bureau of Budget, *Standard Industrial Classification Manual*, 1941, Vol. I, p. iii; Vol. II, p. 60. Finally, under the N. R. A. codes adopted by the very industry of which petitioner is a member, chain store warehouses were treated as wholesale establishments distinct from the retail outlets where the goods were sold, and as subject to the wholesale, not the retail, code.¹⁵

¹⁵ See *supra*, p. 16.

The American Retail Federation's brief amicus devotes considerable space (br., pp. 16-21) to the argument that employees of chain systems like petitioners "are commonly treated and considered as one labor group" and classified as a retail group (br. p. 16, et seq.). In support of this contention they cite (a) the practices under state and federal collective bargaining statutes, (b) administrative practice with respect to state minimum wage orders, (c) government job classification studies for the Retail Trade, and (d) the composition of labor unions. The short answer to reliance upon these sources is that none of them involves the meaning of the terms "establishment" or "retail establishment."

(a) The wholly irrelevant character of the collective bargaining statutes is evident on the face of Section 9 (b) of the National Labor Relations Act. Under that section the Board is given broad authority to determine whether "the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof" (49 Stat. 449, 453, 29 U. S. C. Secs. 151, 159).¹⁶ Obviously the exemp-

¹⁶ "The Board may decide that all employees of a single employer form the most suitable unit for the selection of collective bargaining representatives, or the Board may decide that the workers in any craft or plant or subdivision thereof are more appropriate." *Pittsburgh Plate Glass Co. v. Na-*

tion provided by Section 13.(a) (2) of the Fair Labor Standards Act was not intended to have such breadth.

(b) State minimum wage orders are likewise irrelevant, since the statutes authorizing such wage orders expressly provide for classification by "occupation," which is almost uniformly defined broadly to mean "industry, trade or business or branch thereof or class of work therein."¹⁷

(c) The *Job Descriptions for the Retail Trade* (see br. amicus, p. 18) throw no light on the meaning of the term "retail establishment." Jobs of the character described in these studies are not limited *exclusively* to the retail trade and because there is a similarity in the nature of employees' jobs does not mean they work in the same establishment or that the establishments in which they work perform the same functions. For example, shipping clerks, mail order clerks, stock clerks,

tional Labor Relations Board, 313 U. S. 146, 152. The Board has even certified all workers, who perform work of a particular kind, of several employers as the appropriate bargaining unit. See *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401.

¹⁷ See for example, Illinois Revised Statutes, c. 48, secs. 198-216; New York Consolidated Laws (McKinney's), Labor Law, secs. 550-566. Oklahoma Statutes (1941), ti. 40, secs. 261-284; Mass. Gen. Laws (Terc. ed.), c. 151, secs. 1-15; Rhode Island Public Laws (1935-1936), c. 2289, p. 613; Pennsylvania Statutes (Purdon), ti. 43, secs. 331a-331q. See also the comprehensive analyses on *State Minimum-Wage Laws and Orders*, U. S. Department of Labor, Women's Bureau, Bulletins 167 (1939-1940) and 191 (1942).

typists, stenographers, may be found in the wholesaling and manufacturing trades as well as in the retail trade. Moreover, many of the jobs described which are characteristic of a retail establishment (sales clerks, will-call clerks, lost and found clerks, personal service clerks, complaint desk clerks, floor managers, and credit managers, etc., see *Job Descriptions, supra*, Vols. I and III) are not to be found in a chain store warehouse, like petitioner's, and thus indicate the nonretail rather than the retail character of such warehouses.

(d) The reliance upon labor union organization (br. amicus, p. 19) is equally misplaced in view of the nature of the considerations and influences which determine labor union organization. Moreover the Retail Federation's inference that the American Federation of Labor's Retail Clerks' International Protective Association includes employees in chain store warehouses (see br. amicus, p. 19), is erroneous. We are advised by the president of the American Federation of Labor that the jurisdiction of the Retail Clerks' International Protective Association covers retail clerks employed in retail stores and does not cover employees of wholesale warehouses including chain store warehouses. The employees of these warehouses come under the jurisdiction of a different union—the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. Since the C. I. O. organizes wholesale and retail employees in one union, its practice throws

no light upon the character of chain warehouses as either wholesale or retail.

3. *The policy of the Act as a whole strongly supports the accepted governmental and business meaning of the words*

There is a normal presumption that Congress uses words in regulatory legislation with their accepted governmental and business meaning. Here the circumstances are compelling. To accept petitioner's contention that under this Act an "establishment" is an enterprise or corporation, and that a chain store warehouse performing wholesale functions is part of a "retail establishment," would impute to Congress an intent to disregard settled understanding and would upset existing business practices in a way which Congress surely intended to avoid.

Section 2 (a) of the Act declares the purpose to remove unfair competitive advantage gained by payment of substandard wages and employment for long hours without overtime pay. Cf. *United States v. Darby*, 312 U. S. 100. Section 8 shows the desire of Congress that minimum wage regulation should not give competitive advantage to any group. To disregard the accepted meaning of "retail establishment" in interpreting Section 13 (a) (2), would set these policies at naught by including chain store warehouses within the exemption although their competitors, the wholesalers, are subjected to the requirements of the

Act.¹⁸ In many cases the two organizations are scarcely distinguishable. As indicated by the quotation from the National Wholesale Conference Report, *supra*, pp. 19-20, and by the N. R. A. classification (*supra*, p. 9) food and grocery chain store warehouses perform essentially the same functions as those performed by the independent wholesale grocer. Many chains formerly relied in whole or part upon independent wholesalers for their goods and did not operate their own warehouses. Much attention in recent years has been focused upon the assumption by chains of the distributing functions of independent wholesalers and upon the problems created by the great competitive advantages the chain warehouse has over the independent wholesaler.¹⁹ It has been recognized that the independent wholesaler has felt the impact of the advantages inherent in chain warehouses, which have no selling problem, no credit problem, no loss from bad debts, and

¹⁸ Various attempts, both before the enactment of the Act and subsequently, to secure exemption for employees of "wholesalers," "handlers" and "distributors," have failed. (83 Cong. Rec. 7422 (1938) ; H. R. 4631, 76th Cong., 1st sess. (1939) ; see S. 3048, H. R. 8323, 76th Cong., 3d sess. (1940) ; S. 3180, H. R. 8045, 76th Cong., 3d sess. (1940) ; 86 Cong. Rec. 5267 (1940) ; *id.* at 5457 ; *id.* at 5474.)

¹⁹ *Does Distribution Cost Too Much?*, 20th Century Fund (1939) pp. 105-106, 176, 181, 345-346 ; Beckman and Nolen, *The Chain Store Problem*, pp. 8, 42 ff. ; Beckman and Engel, *Wholesaling*, pp. 255-256 ; Schmalz, Carl N., *Harvard Business Review*, Vol. IX, No. 4, July 1931, *Independent Stores versus Chains in the Grocery Field*, p. 431.

greater efficiency of operation because of their integration with the retail outlets.

The exemption provided by Section 13 (a) (2) admittedly does not apply to the warehouses operated by independent wholesalers. Since labor costs are a considerable part of the wholesalers' total operating cost (56.4 percent),²⁰ the extension of the Section 13 (a) (2) exemption to chain store warehouses would only increase and aggravate the competitive disparity between the chain warehouse and the independent wholesaler.²¹ In view of the prevalent public policy, evinced in state and federal legislation, to curb the crushing competition of the chain organizations,²² it cannot be supposed, in the absence of evidence of such a purpose, that Congress intended to favor the chain over the independent wholesaler, and to increase the

²⁰ U. S. Bureau of the Census, *Census of Business: 1935, Wholesale Distribution*, vol. II, table 1, p. XIX.

²¹ Although on the record in the instant case, it does not appear that petitioner's warehouse does any wholesale business with independent retailers, many chain store warehouses compete directly with independent wholesalers by performing the wholesaling functions for independent retail stores as well as for their own outlets. Beckman and Nolen, *The Chain Store Problem*, p. 8.

²² See e. g., Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, and chain store tax statutes cited, *supra*, n. 3, p. 13. See also Beckman and Nolen, *The Chain Store Problem*, pp. 246-289; *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527, 534-536; *Great Atlantic and Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 419-421, 426-427, rehearing denied, 302 U. S. 772.

chain's competitive advantage by permitting it to pay substandard wages to employees engaged in its warehouse and wholesale distribution units. "To hold otherwise would defeat the expressed purpose of the Act to prevent making interstate commerce an instrument of competition in the distribution of goods produced under substandard labor conditions." *Walling v. Goldblatt Bros.*, 128 F. (2d) 778, at 784 (C. C. A. 7).

Particularly when consideration is given to the implications of petitioner's position and its impact upon the scope of the Act, it must not be presumed that Congress intended such a result. If all employees of a whole chain store enterprise are to be included within the exemption, vast segments of nonretail industries plainly intended to be covered by the Act will be withdrawn from its scope by the continued expansion of the wholesaling and manufacturing functions of chain store enterprises. The serious curtailment of the scope of the Act that might result from petitioner's theory was graphically indicated in the case of *Walling v. American Stores Co.*, 133 F. (2d) 840 (C. C. A. 3), where it was claimed that the entire American Stores chain system, including eleven warehouses, seven bakeries, a six story central office building, a bottling works and a large food processing and manufacturing plant, in addition to its approximately 2,300 retail stores constituted a single "re-

tail establishment" within the exemption of Section 13 (a) (2).²³

The legislative history of Section 13 (a) (2) certainly does not require the exemption of a whole chain enterprise or its nonretail units. It shows that the employees whom Congress intended to exempt are those engaged in ordinary grocery and department stores and the like, not central office and warehouse employees of a multi-unit chain who are engaged in the interstate purchase and distribution of goods. See *Walling v. American Stores Co.*, 133 F. (2d) 840, 843-844 (C. C. A. 3); Judge Garrecht dissenting in *Walling v. Block*, 139 F. (2d) 268, 272, 273 (C. C. A. 9) certiorari denied, 321 U. S. 788.

²³The Third Circuit rejected this contention pointing out that if it were to be adopted "any manufacturer or wholesaler, no matter how large, would bring himself within the exemption through establishment of his own retail outlets for sale to intrastate customers" and that "the legislative policy of the Act as expressed in Section 2 is not to be defeated by such artificial enlargement of two words used in an exemption clause." 133 F. (2d) at 844. The Court held that the warehouses and manufacturing and processing plants of the chain were distinct establishments and were not exempt. It concluded that the apparent intent of Congress was to exempt retail stores and establishments "comparable to the intrastate 'local' or 'corner grocery man', 'druggist', 'meat dealer', 'filing-station man', or * * * 'department store.'" 133 F. (2d) at 844. See also *Walling v. Goldblatt Bros.*, 128 F. (2d) 778, 783 (C. C. A. 7).

Petitioner undertakes to distinguish these decisions on the ground that the employers operated manufacturing and processing plants as well as warehouses (br., pp. 10, 13-14). But both courts plainly based their conclusions on the premise that Congress intended to exempt only ordinary retail stores.

C. THE LEGISLATIVE HISTORY OF SECTION 13 (a) (2) SHOWS THAT CONGRESS DID NOT INTEND TO EXEMPT EMPLOYEES IN CHAIN STORE WAREHOUSES

The original Black-Connery Bill²⁴ contained no exemption comparable to Section 13 (a) (2). A month before the enactment of the statute in its final form, however, the House adopted an amendment, from which Section 13 (a) (2) developed, exempting "any retail industry, the greater part of whose sales is in intrastate commerce." The adoption of this amendment followed a discussion during which several Congressmen expressed their desire to assure the exemption of small retailers—"the corner grocery store man or the filling station man" and "the local groceryman, druggist, clothing store, meat dealer—any merchant in fact." Representative Celler, the sponsor of the amendment, stated: "accept it and then retail dry goods, retail butchering, grocers, retail clothing stores, department stores will all be exempt." See 83 Cong. Rec. 7436-7438.

The exemption did not become law in the form in which it first passed the House. In the House-Senate conference it appeared in the confidential Conference Committee prints dated June 10, 11, and 12, 1938, as an exemption of employees "engaged in any retail *establishment* the greater part of whose selling is in ~~interstate~~^{intrastate} commerce." Still later, the words "or service" and "or servicing"

²⁴ S. 2475 and H. R. 7200, 75th Cong., 1st sess., May 24, 1937.

were inserted without comment.²⁵ Section 13 (a) (2) then assumed the form in which it became law.²⁶

Two points stand out in this brief history. First, despite some general statements about exempting "retailing,"²⁷ the only specific illustrations used by the legislators who supported the amendment named those establishments which first come to mind when we speak of "local retailers" or "local retail establishments"—that is, grocery stores, filling stations, butcher shops, dry goods stores, clothing stores, and department stores—all of them establishments which serve the consuming public directly. Second, in the exemption which was finally enacted the Conference Committee substituted the narrower and more precise word "establishment" for the broad term "industry." Whatever the exemption may have meant in its original form, its final language was restricted to the establishment or place of business which makes retail sales. We may not say that Congress meant nothing by this change. Cf. *Fox v. Standard Oil Co.*, 294 U. S. 87, 96; *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 448. Against any argument that would enlarge the exemption beyond the illustrations given by its

²⁵ Perhaps to make clear the exemption of the "filling station man" and of establishments like restaurants which do not make "sales" in the strict sense. See *Consolidated Timber Co. v. Womack*, 132 F. (2d) 101, 106 (C. C. A. 9).

²⁶ See H. Rep. No. 2738, 75th Cong., 3d sess., p. 32.

²⁷ See 83 Cong. Rec. 7438.

supporters, the change in phraseology is decisive (*Fleming v. American Stores Co.*, 42 F. Supp. 511, 517-518 (E. D. Pa.), modified and affirmed, 133 F. (2d) 840 (C. C. A. 3)), for the words finally used conform in their accepted meaning to the purpose which the Congressmen who proposed the amendment expressed.

The courts have given effect to this legislative history and, except in the *Block*, *Wiemann*, and *Allesandro* cases,²⁸ have refused to extend the exemption beyond ordinary retail stores. "It is quite clear that the exemption in Section 13 (a) (2) was added to eliminate those retailers located near the state lines and making some interstate sales" (*Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 571). The exemption is to be confined typically to "grocery stores, drug stores, hardware stores and clothing shops" (*Fleming v. A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572 (C. C. A. 3), affirmed, 316 U. S. 517), to "retail dry goods, retail butchering, grocers, retail clothing stores, department stores" (*Bracey v. Luray*, 138 F. (2d) 8, 10-11 (C. C. A. 4), and to "restaurants, hotels, laundries, garages, barber shops, beauty parlors, funeral homes, shoe-shining parlors, clothes pressing clubs, and the like" (*Schmidt v. Peoples Telephone Union of Maryville, Mo.*, 138

²⁸ *Walling v. Block*, 139 F. (2d) 268 (C. C. A. 9), certiorari denied, 321 U. S. 788; *Walling v. Wiemann Co.*, 138 F. (2d) 602 (C. C. A. 7), certiorari denied, 321 U. S. 785; *Alessandro v. C. F. Smith Co.*, 136 F. (2d) 75 (C. C. A. 6).

F. (2d) 13, 15 (C. C. A. 8)). See also *Collins v. Kidd Dairy & Ice Co.*, 132 F. (2d) 79, 80 (C. C. A. 5); *Consolidated Timber Co. v. Womack*, 132 F. (2d) 101, 107 (C. C. A. 9); *Guess v. Montague*, 140 F. (2d) 500 (C. C. A. 4); *Reynolds v. Salt River Valley Water Users Assn.*, 143 F. (2d) 863 (C. C. A. 9); *Sun Pub. Co. v. Walling*, 140 F. (2d) 445 (C. C. A. 6), certiorari denied, 322 U. S. 728; *Walling v. Roland Electrical Co.*, 8 Wage Hour Rept. 82 (C. C. A. 4, 1945); *Walling v. Peoples Packing Co.*, 132 F. (2d) 236 (C. C. A. 10); *Walling v. Sondock*, 132 F. (2d) 77 (C. C. A. 5). *Wood v. Central Sand & Gravel Co.*, 33 F. Supp. 40, 46-47 (W. D. Tenn.).

Petitioner's warehouse and central office employees are not engaged in anything comparable to the establishments thus described, with which alone Congress was expressly concerned. Moreover, the considerations leading to the exemption of the one do not apply to the other. On the contrary, as pointed out earlier (*supra*, pp. 19-20, 26-28), the duties and economic position of employees in petitioner's chain store warehouse are the same as the duties and economic position of the independent wholesaler's employees who, when they are engaged in commerce, are subject to the Act and outside any exemption. Section 13 (a) (2) should not be expanded without reason to cover a situation quite different from the one to which it was directed.

Petitioner would ignore these factors and the

evidence of Congressional intent that most courts have found persuasive, on the ground that the words are too clear to permit recourse to extrinsic evidence (br., pp. 3, 16). We submit that if the words are so clear and unambiguous, the clarity is in the direction of the restricted exemption and not the broad one asserted by petitioner.

D. IF THE MEANING AND PURPOSE OF THE EXEMPTION WERE OTHERWISE UNCERTAIN, THE CONSISTENT ADMINISTRATIVE INTERPRETATION SHOULD BE DECISIVE

We submit that the foregoing considerations—the natural ordinary meaning of the statutory language, the accepted governmental and business usage, the legislative history, and the relevant economic factors—leave no doubt of the correctness of the Administrator's interpretation of the exemption. Petitioner's contention that the words "retail establishment" unambiguously include petitioner's chain store warehouse clearly is without foundation. Under N. R. A., the very industry of which appellant is a member, expressly defined "Retail Food and Grocery Establishment" and "establishment" to exclude such warehouses and treated them as wholesale establishments under a separate wholesalers' code. (See p. 16, *supra*.) Petitioner in effect asserts that although state legislatures, the Bureau of the Census, the Bureau of the Budget for all federal departments, the N. R. A. code authorities, industry, and the

courts, have used the phrase as excluding chain store warehouses, here, nevertheless, as a matter of etymology, that is not even a permissible interpretation. The argument answers itself.

If the meaning and intent of the language were otherwise uncertain, the Administrator's view should be adopted according to well settled and salutary principles of statutory construction.

"The Act is remedial in its nature and should be liberally construed and the exceptions to the coverage of the Act should be narrowly construed." *Calaf v. Gonzalez*, 127 F. (2d) 934, 937 (C. C. A. 1). Where the court has an equal choice between two interpretations, one of which will permit employees plainly covered by the Act to retain its benefits and the other of which will deny its benefits to such employees, the former construction must prevail. See *Theological Seminary v. Illinois*, 188 U. S. 662, 671; *Bank of Commerce v. Tennessee*, 161 U. S. 134, 146; *United States v. Stewart*, 311 U. S. 60, 71; *Pacific Co. v. Johnson*, 285 U. S. 480, 491. See also cases cited pp. 9-10, *supra*.

Moreover, decisive weight should be attached to the administrative interpretation here because it has been consistently maintained and represents the result of thorough consideration of all relevant factors. See *Skidmore v. Swift & Co.*, No.

12, this Term, decided December 4, 1944. The Administrator announced his view of the scope of the Section 13 (a) (2) exemption shortly after the Act became effective and he has adhered to it consistently. In Interpretative Bulletin No. 6, issued in December 1938,²⁹ he interpreted "retail establishment" to apply typically to grocery stores, clothing stores, and the like, which sell to the general consuming public. The bulletin made it clear that the "establishment" is the unit store and that in the case of chain store systems a central warehouse, physically separated from the stores, is a separate "establishment," which is not exempt because it does no retail selling.³⁰

The Administrator has consistently maintained this interpretation. In the *First Annual Report of the Administrator of the Wage and Hour Division, United States Department of Labor* (January 8, 1940), p. 21, he informed the Congress that "each physically separated store of a chain of stores will be considered a separate 'retail estab-

²⁹ Interpretative Bulletin No. 6, United States Department of Labor, Wage and Hour Division, reprinted in 1940 Wage and Hour Manual (Bureau of National Affairs, Inc., Washington, D. C.), pp. 154-158. ~~A copy of~~ The pertinent portions of this Bulletin ^{are} printed in the Appendix, pp. 40-45, *infra*.

³⁰ Interpretative Bulletin No. 6, paragraphs 1, 3, 6, 17, 18.

lishment'. The warehouses and central executive offices of the chain are not 'retail establishments.' " He has reviewed and revised the Interpretative Bulletin from time to time but has never changed this principle. The Circuit Court of Appeals for the Seventh Circuit was mistaken when it stated in *Walling v. Wiemann Co., supra*, that the Administrator's view had been altered to meet the needs of litigation. The latest detailed statement of his position is set out in the June 1941, revision of Interpretative Bulletin No. 6, paragraphs 1-4, 11-12, and 33-37 of which are reprinted in the appendix to this brief.

Consistent administrative interpretation of the Act is entitled to great weight in judicial construction. "While the interpretative bulletins are not issued as regulations under statutory authority, they do carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application" (*Overnight Motor Co. v. Missel*, 316 U. S. 572, 580-581; n. 17). The Administrator's interpretation has added significance where, as here, "the thoroughness * * * in its consideration, the validity of its reasoning [and] its consistency with earlier and later pronouncements" are evident *Skidmore v. Swift & Co.*, No. 12, this Term, decided December 4, 1944, slip opinion, p. 5.

CONCLUSION

The judgment of the Circuit Court of Appeals
should be affirmed.

Respectfully submitted.

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APPENDIX

INTERPRETATIVE BULLETIN NO. 6 (1941 REVISION)

1. Section 13 (a) (2) of the act grants an exemption from the minimum wage provisions of section 6 and the maximum hours provisions of section 7, as follows:

The provisions of sections 6 and 7 shall not apply with respect to * * * any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *.¹

2. The scope and applicability of section 13 (a) (2) are set forth in the statute itself; if the facts of a particular case satisfy the terms of the section an exemption is automatically available. The statute confers no authority upon the Administrator to extend or restrict the scope of section 13 (a) (2) or to impose legally binding interpretations as to its meaning. This bulletin is merely intended to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties until he is directed otherwise by the authoritative ruling of the courts or until he shall subsequently decide that his prior interpretation is incorrect.²

¹ The word "whose" in section 13 (a) (2) is interpreted to refer to the selling or servicing of the "establishment" rather than the selling or servicing of any particular "employee" of the establishment.

² The United States Supreme Court has stated that the interpretations expressed in the interpretative bulletins of this Division are entitled to great weight. *United States v. American Trucking Ass'ns*, 310 U. S. 534.

3. The courts have indicated that all exemptions in the act should be construed narrowly.³ The person claiming an exemption must show affirmatively that his case falls both within the language and the statutory purpose. Section 13 (a) (2), was intended to apply typically to the grocery store, butcher shop, haberdashery, clothing store, filling station, beauty parlor, hotel, and similar commonly recognized retail and service establishments. Unless an establishment is clearly a retail or service establishment for purposes of section 13 (a) (2), an assumption that the exemption applies involves considerable risk of violation.

4. Since section 13 (a) (2) grants an exemption from the wage and hour provisions contained in sections 6 and 7 of the act, it seems logical in any given case to determine first whether these sections are applicable by their own terms. Unless an employee is engaged in interstate commerce or in the production of goods for interstate commerce, sections 6 and 7 are not applicable and accordingly it becomes unnecessary to ascertain whether section 13 (a) (2) affords an exemption. In this connection, attention is directed to Interpretative Bulletins No. 1 and No. 5 which discuss the coverage of sections 6 and 7.

* * * * *

11. A retail establishment is patronized regularly by the general consuming public. It is characteristic of wholesale establishments to exclude the general consuming public, as a matter of established business policy, and to confine their sales

³ *Fleming v. Hawkeye Pearl Button Co.*, 113 F. (2d) 52 (C. C. A. 8th); *Bowie v. Gonzalez*, 117 F. (2d) 11 (C. C. A. 1st); *Wood v. Central Sand and Gravel Co.*, 33 F. Supp. 40 (W. D. Tenn.).

to other wholesalers, retailers and large-scale industrial or business purchasers. As a general rule, any establishment which refuses to sell to the general consuming public will not be considered a retail establishment. In some cases, however, the sales of an establishment are made almost exclusively to business and industrial purchasers, even though the establishment does not actually refuse to sell to the general consuming public. Thus, many establishments are engaged in selling goods which have only an industrial or business market, e. g., establishments engaged in selling production machinery, freight trailers, oil-well drilling machinery and equipment, etc. These establishments are not retail establishments within the meaning of section 13 (a) (2) since they do not sell regularly to the general consuming public.⁴

⁴ Ordinarily the following types of goods have only an industrial or business market and are not sold to the general consuming public. Accordingly, sales of such goods, in the ordinary case, are not retail. It should be noted that the types of goods listed below are merely examples and do not comprise an exhaustive enumeration.

Automatic vending machinery, butchers' equipment, filling station equipment, hotel and restaurant equipment, soda fountain equipment, and store equipment.

Construction equipment (such as derricks, scaffolding, and elevators), construction machinery (such as concrete mixers, sanding and polishing machines, excavating shovels, and graders), and road machinery and equipment.

Bakers' equipment, bottles and bottling equipment, canning machinery, chemical equipment, conveyor and hoisting machinery, drilling machinery, foundry equipment, jewelers' equipment, machine tools, mechanical rubber goods (such as belting, packing, gaskets, and recoil pads), mill and mine supplies, power engines, powerhouse equipment (such as

12. A retail sale is a sale of goods for direct consumption and not for purposes of resale or redistribution in any form. Sales to wholesalers, jobbers, or retailers for resale by them are not retail sales, regardless of the price or quantity involved.⁵ Similarly, the distribution of goods from a chain-store warehouse to retail stores of the chain is not retail distribution, and the warehouse is not a retail establishment. The fact that the distribution from the warehouse to the stores does not involve a "sale" in the strict legal sense does not alter the nonretail character of the distribution. In some cases, however, an establishment exchanges goods as a favor to a competitor. For example, an automobile dealer may have a demand for a maroon-colored automobile which

boilers, condensers, injectors, filters, and stokers), printers' and lithographers' supplies, shoe machinery, textile machinery and equipment, and welding equipment.

Dental supplies and equipment (such as dentists' chairs, drilling machines, X-ray machines, etc.), pharmacists' supplies, school equipment and supplies (such as schoolroom blackboards, schoolroom desks, etc.), laboratory equipment and supplies, and hospital equipment and supplies (such as operating instruments, X-ray machines, operating tables, etc.).

Barber and beauty parlor equipment, dry cleaners' supplies, commercial laundry equipment and supplies, plumbers' equipment, shoe repairers' equipment, undertakers' supplies, upholsterers' supplies, and warehouse equipment and supplies.

Commercial aircraft and aeronautical equipment, railroad equipment and supplies, commercial ship equipment and supplies, and other commercial transportation equipment and supplies (such as tramways, aerial hoists, motorboats, and compressed-air tubes).

⁵ An additional ground for reaching the same result is that sales for purposes of resale normally involve large quantities of goods and discounts from the regular retail price.

he does not have in stock. To satisfy his customer, the dealer exchanges a black car for a maroon model which his competitor has in stock. In our opinion, such exchanges may be disregarded in analyzing the selling of the establishment.

RETAIL OR SERVICE ESTABLISHMENT

33. A determination of the meaning of the word "establishment" in section 13 (a) (2) is necessary not only in order to decide whether an enterprise, or portion thereof, is within the exemption but also to ascertain whether the provision of the exemption, requiring that the greater part of the selling or servicing of an establishment be in intra-state commerce, has been satisfied. *The word "establishment" as used in section 13 (a) (2) ordinarily means a physical place of business.* In the case of the independent grocery store or butcher shop, the entire business is conducted in a single establishment.

34. *The term "establishment" is not synonymous with the words "business" or "enterprise" as applied to multi-unit companies.* Thus, for example, a manufacturing company which has its own retail outlets operates a number of separate and different types of establishments. *Each physically separated place of business must be considered as a separate establishment, and the applicability of the exemption depends upon whether the particular establishment possesses the characteristics of a retail or service establishment.*

35. The unit store will ordinarily constitute the retail or service establishment contemplated by the exemption, even though it may be operated as a concession in a hotel, railroad station, or general

market. In such cases, the structure of the enterprise is relatively simple and the independent ownership of the particular store or shop will usually be the determining consideration.

36. The large department store normally is a complicated enterprise engaged in retail selling. It carries a wide variety of lines of merchandise which are ordinarily segregated or departmentalized not only as to location within the store, but also as to operation and records. However, if there is unity of ownership of all departments, and if all departments are operated as a single store, the enterprise, taken as a whole, will ordinarily be considered to be the establishment within the meaning of section 13 (a) (2).^{*}

37. The question has been raised as to the scope of the term "establishment" in the case of chain-store systems, branch stores, groups of independent retailers organized to carry on business in a manner similar to chain-store systems, and retail or service outlets of large manufacturing or distributing concerns. *In the ordinary case, each physically separated unit or branch store will be considered a separate establishment within the meaning of the exemption. The exemption, however, does not apply to warehouses, central executive offices, manufacturing or processing plants, or other nonretail selling units which distribute to or serve stores. These are physically separated establishments which do not have the characteristics of retail or service establishments.*

^{*} If any department in the store is engaged in manufacturing operations, the exemption applicable to the rest of the store is not applicable to that department.